CF0000060794

GA 2111/2 1318

XII-188/(Jail)
P.R.—5,000-9-61

Division Bench (riminal)

APPEAL OF PRISONER

(2)

No. 1017 Name सुरवदेव

Father's name दिलवाश्य

Resi[illegible] मजरा बला प्रतापुर Age 38 yrs

Sentenced to आजीवन रुपा दो वर्ष on अपर सत्र न्यायाधीश

2000-100 रुपये जुर्माना अंबिकापुर

Under section 302 404 IPC

.....

It is explained to the prisoner that if he states or wishes to be represented by a legal practitioner the Appelate Court will not proceed with the base for seven days unless the legal practitioner appears. If the legal practitioner does not appear with in seven days he may not be heard at all if the prisoner states that he does not wish to be represented by legal practitioner the court may proceed at once with the case and will not be obliged to give a hearing to any legal practitioner who should appear.

1 Date of Application for copy of Judgement .....

2 Date of which copy received 12.8.96

3 Date on which Appeal sent 13.8.96

4 Whether the prisoner wishes to be represented or not – Yes/No.

.....

No. 1017 Name सुरवदेव

Continued in 13.8.96 Jail Ambikapur

No. 1918 dated 13.8.96 198

Forwarded to the CHIEF JUDICIAL MAGISTRATE Ambikapur

to gather with a copy of judgement or order passed in the case for favour of transmission to the proper Appilliate Court.

संलग्न – निर्णयप्रति पत्रावली

Superintendent-Central/District Sub-Jail

अधीक्षक

जिला बन्दी अम्बिकापुर (सरगुजा)

Date of receipt in C. J. M.'S Office 13/8/96

Date of receipt of record to accompany 21/11/96

Memo of Appeal of the Appeliate Court.

No. 0 Dated 21 नवम्बर 198

Forwarded to the माननीय 3 रे न्यायाधीश कक्ष के लिए

C.J.Magistrate

मुख्य न्यायिक मजिस्ट्रेट

अम्बिकापुर, जिला सरगुजा (म.प्र.)

Date of receipt in Appliate Court .....

(P.T.O.)

(21)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Criminal Appeal No. 2141 OF 1996

Sukhdev

Vs.

State of M.P.

JUDGEMENT FOR CONSIDERATION

Sd/-
Dhirendra Mishra
Judge

HON'BLE SHRI L.C.BHADOO ,J.

Sd/-
L.C. BHADOO
Judge

POST FOR JUDGMENT ON 16th FEBRUARY 2006

Sd/-
DHIRENDRA MISHRA
Judge

(22)

DIVISION BENCH: HON'BLE SHRI L.C.BHADOO
& HON'BLE SHRI DHIRENDRA MISHRA, JJ

CRIMINAL APPEAL NO. 2141 of 1996

Appellant : Sukhdev

Vs.

Respondent : State of Madhya Pradesh

Ms. Sharmila Singhai, learned counsel for the appellant.

Shri Akhil Mishra, learned P.L. for the respondent/State.

JUDGMENT
(16.02.2006)

Dhirendra Mishra, J

By this appeal under Section 374(2) of the Code of Criminal Procedure the accused/appellant has challenged the legality and correctness of the judgment of conviction and order of sentence dated 12.08.96 passed in Session Trial No. 54/93 whereby the learned Additional Sessions Judge, Surajpur, District Surguja after holding the accused/appellant guilty for commission of murder of Dhaniram convicted him under Sections 302 & 404 of the Indian Penal Code and sentenced to undergo imprisonment for life and to pay a fine of Rs. 200/-, in default of payment of fine to further undergo SI for two months under Section 302 of the IPC and to undergo RI for two years and fine of Rs. 100/- in default of payment of fine to further undergo SI for one month under Section 404 of the IPC.

2. Case of the prosecution is that complainant Bholaram lodged the report (P-4) on 17.09.92 at 13.00 hrs. in police station Pratappur to the effect that at about 7-8 a.m. Peon of Karsi School namely Birju Penka came to

his house and informed that a boy has been murdered and placed in the verandah of the Middle School. He along with other villagers went to the said School and saw that dead body of a young man with grievous injuries over his nose and nobody was able to recognize the body. Body was covered with Lungi and from appearance it appeared that he had been murdered with a sharp edged weapon. On the basis of said information offence under Section 302 of the IPC was registered against the unknown persons and the police proceeded for the scene of occurrence. After reaching the place of incident inquest was performed on the body of the deceased after notice to the panchas in their presence. Plain soil and blood stained soil was seized from the place of incident vide Ex.P-2. Blood stained soil from near the head of the deceased in a nearby grass, blood stained and plain mortar of a nearby wall and a pair of Chappal were seized vide Ex.P-2 A, blood stained soil was also seized from the nearby P.W.D. Road vide Ex.P-3. Dead body was sent for post mortem examination to Primary Health Centre, Pratappur vide Ex.P-15. Dr. A.K.Khare P.W.-14 conducted the post mortem over the body of deceased Dhaniram and submitted his report Ex.P-16. Doctor who performed autopsy found incised wounds on the right side and left side of the neck, bone deep, incised wound of lower most part of the neck near external notch bone deep, incised wound below notch and over the upper lips up to the depth of mouth, bone as also tongue were chopped. Left carotid nobs, thyroid nobs were also found swollen. On internal examination right and left lungs were found congested, trachea was found filled with blood, both the chambers of heart were empty, semi-digested food was found in the stomach. All the injuries were anti mortem in nature and cause of death was respiratory failure and excessive bleeding from the above injuries. Death was homicidal in nature and the injuries sustained by the deceased were sufficient to cause death in the ordinary course of nature.

3. During investigation the present appellant and co-accused Timal, S/o. Bengwa Kodaku and Lodhri, S/o. Purushottam Vishwakarma were taken into custody. On the basis of memorandum of the appellant recorded on 24.09.92 blood stained Dhoti, Bengali Kurta and blood stained waist were seized vide P-8. On the memorandum P-9 of co-accused Timal recorded on 24.09.92 a plastic bag and two notes of hundred denomination were seized vide Ex.P-10. On memorandum dated 24.09.92 of co-accused Lodhri P-11 blood stained axe and one note of hundred denomination were seized vide Ex.P-12. An old bicycle was seized from Ramesh Kumar on 24.09.92 vide P-13, sealed packet containing bood stained underwear and Lungi of the deceased were seized vide P-14. Blood stained shirt of co-accused Lodhri was seized vide P-10. Blood stained underwear and shirt of accused Timal were seized vide P-21. Seized axe was sent for chemical examination to the doctor who submitted his report vide P-17. A spot map P-18 was prepared by Halka Patwari. Appellant Sukhdev and co-accused Lodhri were arrested on 25.09.92. Test identification parade of seized bicycle and clothes of the deceased was conducted vide P-27 by M.K.Pandey, Tahsildar. After recording the statement of the witnesses charge sheet was filed under Sections 302, 392 and 201/34 of the IPC. Against the accused/appellant as also co-accused Timal and Lodhri in the Court Judicial Magistrate First Class, Surajpur who in turn committed the case to the Session Judge, Ambikapur. Learned Additional Sessions Judge, Surajpur received the case on transfer for trial.

4. Learned trial Court framed the charges under Sections 392,/ 397 and 302 of the IPC against the accused persons. The accused/appellant abjured his guilt.

5. The prosecution in order to establish its case examined twenty two witnesses in all. Statement of the accused/appellant was also recorded under Section 313 of the Cr.P.C, in which he denied the circumstances appearing against him and stated that Jaiswals and Rajwars of the village wanted to employ them by paying less wages and since they denied this they have been falsely implicated in the case.

6. After hearing learned Additional Public Prosecutor and counsel for the appellant, the trial Court convicted and sentenced the accused/appellant as mentioned above. However, accused Timal has been acquitted of the charges leveled against him.

7. Learned counsel for the accused/appellant submits that there is no eyewitness to the incident and learned Additional Sessions Judge has convicted the appellant on the basis of circumstantial evidence. According to the counsel for the appellant the circumstances relied upon by the prosecution are not of conclusive nature and individual circumstance has not been established by leading cogent evidence but even then the trial Court on the basis of circumstance that the deceased was last seen alive in the company of the appellant and on the basis of recovery of blood stained clothes of the deceased on his memorandum which were subsequently identified by the family members of the deceased, has held the appellant guilty for commission of the aforementioned offence which is contrary to law as well as the facts.

8. Homicidal nature of death is not in dispute.

9. Even otherwise from the statement of P.W.-14 Dr. A. K. Khare who conducted the post mortem examination on the body of the deceased it is clear that four incised injuries – three over the neck and one over the

lower part of the nose, above the upper lips and the death was homicidal in nature. According to the doctor all the injuries present on the body of the deceased were sufficient to cause death in the ordinary course of nature. It is not the case of the defence that the injuries present over the body of the deceased were the self inflicted injuries and thus it is held that death was homicidal in nature.

10. To establish the involvement of the deceased in commission of the offence, the prosecution has relied upon circumstantial evidence which may be summarized thus :

i) few days before the incident deceased Dhaniram had sold his land and had gone to Surajpur in connection with a Court case on a bicycle. However on the way he borrowed the bicycle of Budhan P.W.-9 as his own bicycle was punctured and entrusted his bicycle to Budhan who returned the same to its owner Arjun.

ii) Ram Das P.W.-6 saw the accused Sukhdev with deceased Dhaniram near the house of Durjan when both were standing and at that time also Dhaniram was having a bicycle and on the following day Ram Das learnt that Dhaniram has been murdered.

iii) On the following day P.W.-4 Birjuram saw a person sleeping in the verandah of a School who also found there blood whereupon matter was reported to the Principal of the High School.

iv) P.W.-10 Kanhai has stated in his evidence that in the morning of the incident he learnt that Dhaniram of village Karsi has been murdered and in the same morning at about 9.00 a.m. the appellant came to him and gave him a note of hundred denomination and demanded in exchange the notes of smaller denomination and just thereafter accused Timal came to his shop and purchased biscuit.

v) On interrogation by the police the accused in his memorandum statement disclosed that he had hidden the bicycle in the *Baadi* of Timal and on the next day he left it in the house of Ramesh. He has also stated that he concealed Dhoti, Kurta and waist of deceased Dhaniram in the *Baadi* of Mohan and on the basis of his statement clothes of the deceased have been seized vide P-8. Similarly on the basis of memorandum of co-accused Timal two hundred rupees and a bed sheet were seized vide P-10.

vi) Ramesh PW-12 has stated in his evidence that accused/appellant Sukhdeo had given the bicycle for repairs and the same bicycle was seized by the Police vide P-12. Cloths of the deceased seized during investigation were duly identified by Budhan and Nandkeshwar and on the basis of these circumstances the Trial Court has held that the involvement of accused/appellant Sukhdeo in committing the murder of Dhaniram is established. However, the appellant has been acquitted of the charge of loot. It has been held that after causing death of the deceased the appellant took his bicycle and other articles and offence so committed is punishable under section 404 of the IPC and convicted him as such. However, co-accused Timal has been acquitted of all the charges.

11. As far as the circumstance that the deceased sold the land and was possessing money is concerned, since the Court below has found no evidence to convict the appellant under sections 397 or 392 of the IPC and has acquitted the appellant of the above charge, therefore, the above circumstance relied upon by the prosecution is of no relevance. To establish the circumstance of last seen together the prosecution has relied upon the evidence of Laxman PW-5 who has stated that he was a cycle shop owner in village Masga and the deceased Dhaniram of Navadih

came to his shop at about 4 O' clock as he was going to Surajpur on bicycle and at that time he war wearing Lungi and Kurta and was proceeding towards Pratappur. Ramdas PW-6 has stated in his evidence that at about 6 p.m. when he was going towards his house, he saw appellant Sukhdeo with Dhaniram while they were standing near the house of Durjan and at that time Dhaniram was having a bicycle and on the following day when the Police came to the village he learnt that Dhaniram had been murdered by someone in Karsi School which is 4-5 kms away from his house. From the evidence of these witnesses the only circumstance that is established is that the deceased and the appellant were standing on the road and talking together and the deceased was having a bicycle. However, dead body of the deceased was found in Karsi School which is 4-5 kms away from village Masga.

12. It is settled law that the evidence of deceased being last seen alive with the appellant is a relevant circumstance only when the time gap between the last seen and recovery of dead body is so small that the possibility of other persons being the author of crime becomes impossible. In the instant case the time when the deceased and the appellant were spotted together was 6 p.m. near the house of Durjan and the dead body was recovered on the following day at about 7-7.30 p.m. from a school which is 4-5 kms away, therefore, according to our considered opinion the circumstance of last seen is not a circumstance on the basis of which inference about the guilt could be drawn against the accused/appellant. For convicting the accused on the basis of circumstantial evidence the following tests must be satisfied;

i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

ii) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused.

iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

13. The other circumstance relied upon by the trial Court for holding the appellant guilty is that on the basis of memorandum of the appellant blood stained Dhoti was seized vide seizure memo P-8 by Shivratni vide P-27. However, the articles seized on the memorandum of the accused are the common household articles and in the absence of any incriminating evidence regarding blood stains present over the cloths of the deceased, the seizure of the above articles on the memorandum of the appellant cannot be considered as the circumstance to connect the appellant with the commission of the offence in question. The other circumstance relied upon by the trial Court for holding the appellant guilty is that a used white Dhoti with old stains, yellow Bengali kurta and torn vest having blood like stains were seized from the accused/appellant vide Ex.P-8 in the presence of witnesses Sukhlal (P.W.17) and Muthuram (P.W.11). Memorandum of P-7 and seizure in pursuance thereof has been duly proved by Muthuram (P.W.11). The seized articles were correctly identified by Shivratni Bai (P.W. 20) in test identification parade conducted by Naib Tehsildar N.K.Pandey (P.W.22). Learned counsel for the State

vehemently argued that the trial Court was justified in placing reliance in the seizure of clothing of the deceased at the instance of the appellant as the recovery of the articles belonging to the deceased from the possession of the appellant was made soon after the incident which remained unexplained by the appellant and therefore, presumption under illustration 'A' of Section 114 of the Indian Evidence Act will be attracted and therefore, irresistible conclusion would be that the appellant and none else has committed the offence. Reliance is placed on the decision of the Supreme Court in the matters of **Ronny @ Ronald James Alwaris etc. Vs. State of Maharashtra (AIR 1998 S.C. 1251), A.Deivendran and R. Pandian and another Vs. State of Tamil Nadu (AIR 1998 S.C. 2821), Lachhaman Ram etc. Vs. State of Orissa (AIR 1985 S.C.486), Sanjay alias Kaka State of (N.C.T.) Delhi, Nawabuddin alias Nawab Vs. State of Delhi and Vinod Kumar Vs. State of (N.C.T.) Delhi (AIR 2001 S.C. 979.**

14. The incident is of intervening night of 16/17.09.1992. Memorandum of the accused Ex.P-7 was recorded on 24.09.92 and in pursuance of that memorandum seizure of the articles allegedly belonging to the deceased was made at the instance of the accused on 24.09.92 at about 13.00 hours. Test identification of the articles was conducted by the Tehsildar on 21.10.92 in the presence of Nandkishore (P.W.8) and Shivratni (P.W. 20). P.W. 8 Nandkishore has not stated anything in his evidence regarding identification of the clothing of the deceased whereas Shivratni Bai (P.W.20) has stated in her evidence that she had identified the clothing of the deceased before the Tehsildar, Pratappur and had put her thumb impression over the identification memo. However, in paragraph-2 of her evidence she had admitted the suggestion put by the counsel for the defence that police personnel were present at the time of identification and

it is correct to say that in fact the police personnel told her that clothing so seized belonged to the deceased. In these circumstances, seizure of the clothing of the deceased at the instance of the appellant has not been established by the prosecution and as such this circumstance can not be considered for holding the appellant guilty for the offence alleged against him by drawing presumption under illustration 'A' of Section 114 of the Indian Evidence Act.

15. The other circumstance relied by the prosecution is the evidence of Ramesh Kumar PW-12 who has stated therein that the appellant left his bicycle in his shop for being repaired and said that he would take it afterwards and that very cycle was seized by the Police vide P-13 from the custody of Ramesh Kumar which was duly identified by PW-9 Budhan who has stated therein that he had given the seized bicycle to Dhaniram on the date of incident while he was going to Surajpur to attend the Court and on the basis of the above evidence the trial Court has arrived at the conclusion that after causing death of deceased the appellant took the bicycle and concealed the same in the Baddi of Timan and thereafter shifted it to Ramesh. Seizure of the bicycle is from Ramesh (P.W.12). There is no evidence on record to show that alleged seizure has been made on the basis of information given by the appellant on his memorandum. The investigating officer P.K.Rawte who has recorded memorandum of the appellant P-7 has not been examined. P.W. 21 M.S.Chouhan, A.S.I. has proved the signature of P.K.Rawte over Ex.P-7. However, he has not stated that bicycle seized from Ramesh Kumar was seized on the basis of memorandum of the appellant. Owner of the bicycle Budhan @ Jhaula has not given any description of the bicycle in his statement nor there is any evidence on record to show that the deceased was holding the bicycle seized from Ramesh Kumar at the time

when he was seen with the deceased. Thus on the basis of the statement of the witness from whom the bicycle was seized, the appellant cannot be convicted for the aforesaid offence.

16. In the light of the aforesaid discussion the law is settled that circumstances relied by the prosecution to connect the appellant with commission of the offence should be established by cogent and reliable evidence. The circumstances of the present case do not point towards the guilt of the accused. Suspicion howsoever grave it is cannot take the place of proof. In this case the prosecution has failed to establish the involvement of the appellant in committing the crime in question and the findings of the Court below are based on improper appreciation of evidence on record and the same cannot be upheld. Accordingly impugned judgment of conviction and sentence passed by the trial Court is set aside and the appeal stands allowed. Appellant is acquitted of all the charges leveled against him. He be set at liberty if not required in any other case.

Sd/-
L.C. BHADOO
Judge

Sd/-
Dhirendra Mishra
Judge